Supreme Court, U. S.
FILED
JUL 1 1976
R., CLERK

# IN THE
# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

| | |
|---|---|
| HARRY KUBO, NISEI FARMERS LEAGUE AND WESTERN TOMATO GROWERS & SHIPPERS, INC., *Appellants,* vs. AGRICULTURAL LABOR RELATIONS BOARD OF THE STATE OF CALIFORNIA, *Appellee.* | No. 75-1734 |
| PANDOL & SONS, A CALIFORNIA PARTNERSHIP; JASMINE VINEYARDS, INC., A CALIFORNIA CORPORATION, *Appellants,* vs. AGRICULTURAL LABOR RELATIONS BOARD, *Appellee.* | No. 75-1754 |

**On Appeal from the Supreme Court of California**

## MOTION TO DISMISS

ELLEN LAKE,
Counsel

BYRON S. GEORGIOU,
Counsel

JERROLD C. SCHAEFER,
Deputy General Counsel

ROBERT LE PROHN,
Chief of Litigation

AGRICULTURAL LABOR
RELATIONS BOARD
555 Capitol Mall, Suite 233
Sacramento, California 95814

Telephone: (916) 445-6668
*Attorneys for Appellee*

## TABLE OF CONTENTS


| | Page |
|---|---|
| MOTION TO DISMISS | 1 |
| OPINION BELOW | 1 |
| STATUTORY PROVISION INVOLVED | 2 |
| QUESTION PRESENTED | 5 |
| STATEMENT OF THE CASE | 5 |
| A. Adoption of the Access Regulation | 6 |
| B. Court Proceedings | 11 |
| NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BECAUSE THE ACCESS RULE IS CONSTITUTIONAL | 13 |
| A. The Access Rule is a Valid Regulation of Property Under the Police Power | 13 |
| B. The Access Rule is Constitutional Even Though it May Permit Access on the Property of Some Employers Whose Workers May be Reached by Traditional Means of Communication | 17 |
| C. The Access Rule is Consistent with the Principles of Babcock & Wilcox, Central Hardware and Hudgens | 22 |
| 1. The regulation reflects a proper balance between organizational and property rights | 22 |
| 2. The extent of access permitted by the rule comports with the guidelines set forth in Central Hardware | 27 |
| CONCLUSION | 29 |
| APPENDIX A-1 | 33 |
| APPENDIX A-2 | 41 |

## TABLE OF AUTHORITIES CITED

CASES


| | Page |
|---|---|
| Air Pollution Variance Bd. v. Western Alfalfa, 416 U.S. 861 (1974) | 16 |
| Agricultural Labor Relations Board (ALRB) v. Superior Court, 16 Cal.3d 392 (1976) | *passim* |
| Berman v. Parker, 348 U.S. 26 (1954) | 14, 16, 20 |
| Block v. Hirsh, 256 U.S. 135 (1921) | 14 |
| Bowles v. Willingham, 321 U.S. 503 (1944) | 14 |
| Bunting v. Oregon, 243 U.S. 426 (1917) | 15 |
| California v. LaRue, 409 U.S. 109 (1972) | 20, 25 |
| Camara v. Municipal Court, 387 U.S. 523 (1967) | 16 |
| Carolene Products Co. v. United States, 323 U.S. 18 (1944) | 21 |
| Central Hardware Co. v. NLRB, 407 U.S. 539 (1972) | *passim* |
| DeCanas v. Bica, 96 S.Ct. 933 (1976) | 15 |
| Hester v. United States, 265 U.S. 57 (1924) | 16 |
| Hudgens v. NLRB, 96 S.Ct. 1029 (1976) | 7, 22, 23, 24 |
| Kubo v. ALRB, No. A-868 (U.S. April 5, 1976) | 13 |
| Kubo v. Mahony, Fresno Superior Court No. 172286 | 11, 17 |
| Mathews v. Diaz, 44 U.S.L.W. 4748 (U.S. June 1, 1976) | 18 |
| Mathews v. Eldridge, 96 S.Ct. 893 (1976) | 18 |
| Mourning v. Family Publication Service, Inc., 411 U.S. 356 (1973) | 19, 20, 21 |
| Nebbia v. New York, 291 U.S. 502 (1934) | 13, 16 |
| New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) | 30 |
| New York Central R.R. v. White, 243 U.S. 188 (1917) | 15 |
| NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) | *passim* |
| NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949) | 15 |
| North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973) | 30 |
| Pandol & Sons v. ALRB, No. A-871 (U.S. April 5, 1976) | 13 |
| Pandol & Sons v Edmund G. Brown, Jr., No. F-75-165-CIV (E.D. Cal. Sept. 5, 1975) | 12, 17 |
| Pandol & Sons v. Mahony, Tulare Superior Court No. 80521 | 11, 17 |
| No. A-222 (U.S. Sept. 28, 1975) | 12 |
| Pandol & Sons v. Mahony, Tulare Superior Court No. 80521 | 11, 17 |
| SEC v. Chenery, 332 U.S. 194 (1947) | 18 |
| See v. City of Seattle, 387 U.S. 541 (1967) | 16 |
| Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) | 14, 20 |
| Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) | 14, 20 |
| Weinberger v. Salfi, 422 U.S. 749 (1975) | 18, 19, 20 |
| West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) | 15 |




## TABLE OF AUTHORITIES CITED—Continued

CONSTITUTIONS


| | Page |
|---|---|
| United States Constitution, Fourth Amendment | 16 |
| United States Constitution, Due Process Clause | 22 |
| Missouri Constitution, Art. I, § 29 | 27 |
| New York Constitution, Art. I, § 17 | 27 |


STATUTES


| | |
|---|---|
| *Federal* | |
| National Labor Relations Act (29 U.S.C. § 151, et seq.) | *passim* |
| 29 U.S.C. § 152(3) | 5 |
| 29 U.S.C. § 157 | 22 |
| 29 U.S.C. § 158(a)(1) | 22 |
| 29 U.S.C. § 160 | 10 |
| 29 U.S.C. § 203(f) | 5 |
| *California* | |
| Agricultural Labor Relations Act (Cal. Labor Code § 1140, et seq.) | *passim* |
| California Labor Code § 1140 | 6 |
| § 1141 | 6 |
| § 1148 | 25 |
| § 1152 | 2, 3, 6 |
| § 1153 | 2, 6 |
| § 1154 | 6 |
| § 1155 | 6 |
| § 1155.7 | 6 |
| § 1156 | 6 |
| § 1156.3(a) | 8 |
| § 1156.3(a)(1) | 8 |
| § 1156.3(b) | 8 |
| § 1156.3(d) | 29 |
| § 1156.4 | 8 |
| § 1157 | 6 |
| § 1158 | 6 |
| § 1159 | 6 |
| § 1160 | 10 |
| § 1160.1 | 10 |
| § 1160.2 | 10, 12 |
| § 1160.3 | 10 |
| § 1160.4 | 10, 12 |
| § 1160.5 | 10 |
| § 1160.6 | 10 |
| § 1160.7 | 10 |
| § 1160.8 | 10 |
| § 1160.9 | 10 |

**TABLE OF AUTHORITIES CITED—Continued**

*Other States* — Page

Arizona Rev. Stats. § 23-1381, et seq. ..... 26
Arkansas Stats. Ann. § 41-4124 ..... 27
Colorado Rev. Stats. § 8-2-101, et seq. ..... 27
§ 80-4-2(3)(a) ..... 27
Hawaii Rev. Stats. § 377-1, et seq. ..... 26
Idaho Code § 22-4101, et seq. ..... 26
Indiana Ann. Stats. § 35-15-3-1 ..... 27
Kansas Stats. Ann. § 44-818, et seq. ..... 26
Laws of Puerto Rico, Title 29, § 62 et seq. ..... 26
Louisiana Rev. Stats. § 23.822 ..... 27
Michigan Stats. Ann. § 17.454(2)(e) ..... 26
Nevada Rev. Stats. § 614.090, et seq. ..... 27
New Jersey Rev. Stats. § 34:13A-1, et seq. ..... 26
New York Labor Law § 701(3) ..... 27
North Dakota Rev. Code § 34-19-01 ..... 27
§ 34-12-01(3) ..... 27
Oregon Rev. Stats. § 662.805, et seq. ..... 26
§ 663.005(3)(a) ..... 26
Pennsylvania Stats. Ann., Title 43, § 191 ..... 27
§ 211.3(d) ..... 27
Revised Code of Washington, § 49.36.010, et seq. ..... 27
Texas Stats. Ann., Art. 5207a ..... 27
Utah Code. Ann. § 34-2-1
§ 34-20-2(3) ..... 27
Wisconsin Stats. Ann. § 111.01, et seq. ..... 26

**REGULATION**

8 Cal. Admin Code § 20900 ..... *passim*

**MISCELLANEOUS**

ALRB, Report on S.B. 1441 before the Calif. Senate Finance Comm., *Financial Impact of Determination of Access on a Case-by-Case Basis* (March 29, 1976) ..... 21, 33
Declaration of C. David Willis ..... 21, 41
40 NLRB Annual Report (1975) ..... 9
Statement by NLRB Chairman Bette Southard Murphy before the Subcomm. on Labor-Management Relations of the House Comm. on Labor, 94th Cong., 2nd Sess. 5 (May 5, 1976) ..... 10




IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

HARRY KUBO, NISEI FARMERS LEAGUE AND WESTERN TOMATO GROWERS & SHIPPERS, INC.,
*Appellants,*
vs.
AGRICULTURAL LABOR RELATIONS BOARD OF THE STATE OF CALIFORNIA,
*Appellee.*
No. 75-1734

PANDOL & SONS, A CALIFORNIA PARTNERSHIP; JASMINE VINEYARDS, INC., A CALIFORNIA CORPORATION,
*Appellants,*
vs.
AGRICULTURAL LABOR RELATIONS BOARD,
*Appellee.*
No. 75-1754

On Appeal from the Supreme Court of California

## MOTION TO DISMISS

Pursuant to Supreme Court Rule 16(1)(b), Appellee Agricultural Labor Relations Board of the State of California hereby moves to dismiss the appeals in the above entitled cases on the ground that they do not present a substantial federal question.

## OPINION BELOW

The opinion of the Supreme Court of California, applicable to both of the above entitled cases, is en-

titled *Agricultural Labor Relations Board v. Superior Court,* and is reported at 16 Cal. 3d 392, 128 Cal. Rptr. 183, 546 P. 2d 687 (1976). The decision is contained in Appendix A of the Jurisdictional Statements of both appellants.

---

## STATUTORY PROVISION INVOLVED

This case involves the "access regulation" promulgated by the California Agricultural Labor Relations Board, 8 Cal. Admin. Code § 20900, which provides:

> *Access to Workers in the Fields by Labor Organizations.* Labor Code Sec. 1140.2 declares it to be our policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing.
>
> 1. Agricultural employees have the right under Labor Code Sec. 1152 to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as well as the right to refrain from any or all of such activities except to the extent that such right may be affected by a lawful agreement requiring membership in a labor organization as a condition of continued employment. Labor Code Sec. 1153(a) makes it an unfair labor practice for an agricultural employer to interfere with, restrain, or coerce agricultural employees in the exercise of these rights.



> 2. As the United States Supreme Court has stated: Organizational rights are not viable in a vacuum. Their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. When alternative channels of effective communication are not available to a union, organizational rights must include a limited right to approach employees on the property of the employer. Under such circumstances, both statutory and constitutional principles require that a reasonable and just accommodation be made between the right of unions to access and the legitimate property and business interests of the employer.
>
> 3. Generally, unions seeking to organize agricultural employees do not have available alternative channels of effective communication. Alternative channels of effective communication which have been found adequate in industrial settings do not exist or are insufficient in the context of agricultural labor.
>
> 4. The legislatively declared purpose of bringing certainty and a sense of fair play to a presently unstable and potentially volatile condition in the agricultural fields of California can best be served by the adoption of rules on access which provide clarity and predictability to all parties. Relegation of the issue to case-by-case adjudication or the adoption of an overly general rule would cause further uncertainty and instability and create delay in the final determination of elections.
>
> 5. Accordingly, the Board will consider the rights of employees under Labor Code Sec. 1152 to include the right of access by union organizers

to the premises of an agricultural employer for the purpose of organizing, subject to the following limitations:

a. Organizers may enter the property of an employer for a total period of 60 minutes before the start of work and 60 minutes after the completion of work to meet and talk with employees in areas in which employees congregate before and after working.

b. In addition, organizers may enter the employer's property for a total period of one hour during the working day for the purpose of meeting and talking with employees during their lunch period, at such location or locations as the employees eat their lunch. If there is an established lunch break, the one-hour period shall include such lunch break. If there is no established lunch break, the one-hour period may be at any time during the working day.

c. Access shall be limited to two organizers for each work crew on the property, provided that if there are more than 30 workers in a crew, there may be one additional organizer for every 15 additional workers.

d. Upon request, organizers shall identify themselves by name and labor organization to the employer or his agent. Organizers shall also wear a badge or other designation of affiliation.

e. The right of access shall not include conduct disruptive of the employer's property or agricultural operations, including injury to crops or machinery. Speech by itself shall not be considered disruptive conduct. Disruptive conduct by particular organizers shall not be grounds for expelling organizers not engaged in such conduct, nor for preventing future access.



f. Pending further regulation by the Board, this regulation shall not apply after the results of an election held pursuant to this act have been certified.

## QUESTION PRESENTED

Does the United States Constitution prohibit a California administrative agency, mandated to regulate the state's agricultural labor relations, from promulgating a regulation which grants farm labor organizers a limited right of access to agricultural property during an organizational campaign for the purpose of communicating with agricultural workers, which regulation is carefully tailored to the exigencies of California agriculture and based on a factual finding that unions seeking to organize agricultural employees generally do not have available alternative channels of effective communication?

## STATEMENT OF THE CASE

For decades California has witnessed strife and conflict in its fields and vineyards. It has seen repeated clashes between farmworkers, growers, and sheriffs' deputies, which have left numerous persons injured or killed, and thousands more arrested and jailed. It has seen bitter strikes interrupt its harvest, and has watched its agricultural products boycotted throughout the land. Federal labor laws have brought no relief to the California fields because those statutes exempt agricultural employees from their coverage. 29 U.S.C. §§ 152(3), 203(f).

To bring "certainty and a sense of fair play to a presently unstable and potentially volatile condition," (ALRA Preamble, Stats. 1975, Third Ex. Sess., Chap. 1, § 1), the California Legislature enacted the Agricultural Labor Relations Act of 1975 (hereinafter, "ALRA" or the "Act"). Cal. Labor Code §§ 1140, et seq. Because of the urgency of the situation, the Act was passed in an Extraordinary Session and became effective three months later, on August 28, 1975. A comprehensive agricultural labor relations statute, the ALRA establishes a five-member Agricultural Labor Relations Board (hereinafter, "ALRB" or the "Board") (Cal. Labor Code § 1141); grants employees organizational rights (Cal. Labor Code § 1152); provides for secret ballot elections to select a collective bargaining representative or no union (Cal. Labor Code §§ 1156–1159); and characterizes a variety of acts by employers or unions as unfair labor practices, including interference with employees' organizational rights. Cal. Labor Code §§ 1153–1155.7. While modeled in some respects on the National Labor Relations Act, the ALRA's election provisions are significantly different from those under the NLRA, reflecting the exigencies of a seasonal industry with a mobile workforce.

**A. Adoption of the Access Regulation.**

The day the ALRA went into effect, the Board held a 14-hour public hearing to determine whether, and to what extent, farm labor organizers should be



permitted access to an employer's property for organizational purposes. Under the National Labor Relations Act, the NLRB and courts have held that in order to effectuate workers' organizational rights, non-employee organizers have a right of access when no alternate effective means of communication are available. *Hudgens v. NLRB,* 96 S.Ct. 1029 (1976); *Central Hardware Co. v. NLRB,* 407 U.S. 539 (1972); *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956).

The Board heard extensive testimony from workers, employers, unions and law enforcement officials concerning the unavailability of traditional methods for communicating with agricultural employees. The evidence showed the following: Many farmworkers are migrants. They arrive in town for the harvest, and live in labor camps, motels, or with friends and move on when the crop is in. Few farmworkers have listed local addresses or telephones. Consequently, home visits, mailings or telephone calls are unavailing. Many farmworkers are illiterate, most speak foreign languages, and few can afford to purchase radios or televisions, making communication by leaflet, newspapers or the mass electronic media very difficult. Nor can agricultural employees be readily contacted on their way to work. Farmworkers frequently obtain employment through labor contractors, who transport the employees by private buses from camp to field or from ranch to ranch, driving directly onto the premises before unloading. Because farm laborers find jobs through labor contractors

and change employers frequently, they often do not know the name of their employer, making it difficult for unions to submit valid petitions, since the workers cannot be identified with a specific employer when contacted off the job site. See summary of evidence, *ALRB v. Superior Court,* 16 Cal.3d at 414–415.

The ALRA's election provisions, geared to the unique needs of the California farm labor scene, further underscore the inadequacies of conventional means of communication. *ALRB v. Superior Court,* 16 Cal.3d at 416. "Recognizing that agriculture is a seasonal occupation for a majority of agricultural employees, and wishing to provide the fullest scope for employees' enjoyment of [electoral] rights" (Cal. Labor Code § 1156.4), the Act permits elections to be held only during peak periods of employment. *Id.;* Cal. Labor Code § 1156.3(a)(1). To trigger an election, a union must obtain the signatures of the majority of workers at a ranch. To intervene and also appear on the ballot, a second union must obtain signatures of 20 percent of the same work force. Once authorized, an election must be held quickly: within 48 hours in case of a strike, and within seven days in other cases. Cal. Labor Code § 1156.3(a), (b). Thus, in crops with short harvest seasons, the union petitioning for an election has only a brief time in which to gather necessary employee signatures. An intervening union will have even less time



—at most six days to obtain its qualifying signatures. Because of the seven-day election requirement, both unions have only a few days thereafter to explain their positions to the workers.[1]

Based on these factors, the Board found:

> "Generally, unions seeking to organize agricultural employees do not have available alternative channels of effective communication. Alternative channels of effective communication which have been found adequate in industrial settings do not exist or are insufficient in the context of agricultural labor." 8 Cal. Admin. Code § 20900, subd. 3.

As a result, the Board unanimously voted to adopt the challenged regulation, which permits union organizers a right of access to growers' premises, subject to carefully drawn restrictions as to purpose, time and place, number of organizers, and permissible conduct.

The Board chose to proceed by regulation, rather than by the case-by-case approach utilized by the NLRB, because of its determinations that the nature of California agriculture and farm workers would cause access to be required in the vast majority of cases, and that a case-by-case approach would be extremely costly, slow, and destructive of organizational

[1] By contrast, the average period of time between the filing of a petition and the direction of an election under the NLRA is 45 days. 40 NLRB Ann. Rep. 13 (1975). Thereafter, an election is usually not held for approximately one month. Thus, an average election under the NLRA affords the campaigning union ten times longer than under the ALRA to communicate with employees.

rights and labor stability.[2] The Board was also responding to the views of law enforcement officials, who testified that any right of access should be defined with precision and clarity. Lacking that certainty, the officers declared, they would be caught in

[2] The case-by-case approach would involve adjudication of access through the Act's unfair labor practice procedures. *See* Cal. Labor Code §§ 1160–1160.9, which are largely identical to the analogous federal provision. 29 U.S.C. § 160. Under this process, a union claiming that it had been unable to communicate with employees of a particular employer through off-the-job contact would file an unfair labor practice charge in an appropriate regional office of the Board. First, a Board agent would investigate the charges. If the investigation confirmed the union's allegations, a complaint would issue. The case would be heard in a formal proceeding before an administrative law officer or the Board itself, at which the General Counsel would have the burden of establishing that no alternative means of communication were available. Thereafter, following briefing by the parties, the administrative law officer would prepare a proposed report and recommended order. If exceptions were filed, the Board would have to review the entire record, write a decision, and issue an order Cal. Labor Code §§ 1160.2–1160.3. Like the NLRB, the ALRB lacks direct enforcement powers, and its orders may be enforced only by a court, following application by the Board. Cal. Labor Code § 1160.8.

Although the ALRB has no statistics on the length of such proceedings, under the NLRA the median time from the filing of an unfair labor practice charge until a Board decision is 350 days. *Statement by NLRB Chairman Bette Southard Murphy before the Subcomm. on Labor-Management Relations of the House Comm. on Labor,* 94th Cong., 2nd Sess. 5 (May 5, 1976). We are informed by the Division of Operations Management of the NLRB General Counsel's Office that the median time from Board decision to enforcement by the Court of Appeals is an additional 359 days.

By contrast, the access regulation imposes on employers an immediate obligation to permit access by organizers. Only if an employer wrongfully refuses, are unfair labor practice proceedings instituted, at which the only issue is whether access was denied. As a result, since the issuance of the California Supreme Court's stay, access has been immediately available at most ranches. For a fuller discussion, see Appendix A-1.



the middle, without guidance whether to arrest organizers for trespass or to assist them in exercising a lawful right of entry. The Board's reasoning was expressly incorporated into the access rule, 8 Cal. Admin. Code § 20900, subd. 4:

> "The legislatively declared purpose of bringing certainty and a sense of fair play to a presently unstable and potentially volatile condition in the agricultural fields of California can best be served by the adoption of rules on access which provide clarity and predictability to all parties. Relegation of the issue to case-by-case adjudication or the adoption of an overly general rule would cause further uncertainty and instability and create delay in the final determination of elections."

## B. Court Proceedings.

The rule became effective August 29, 1975. On September 10, 1975 the Superior Court for the County of Tulare issued a temporary restraining order against the regulation in an action filed an hour earlier. *Pandol & Sons v. Mahony,* Tulare Superior Court No. 80521. That same day the Superior Court for the County of Fresno issued a peremptory writ of mandate ordering the Board to vacate the rule. *Kubo* v. *Mahony,* Fresno Superior Court No. 172286. The Fresno County action had been filed only two days before.[3]

[3] The state court actions were initiated after a three-judge federal district court for the Eastern District of California, acting in a suit filed by Pandol & Sons and Jasmine Vineyards, ruled that federal abstention was required, and declined to adjudicate any issues in the case. The three-judge panel also termi-

On September 15, 1975 the Board filed a petition for an original writ of prohibition and/or mandate in the California Supreme Court, seeking a determination of the regulation's validity and an immediate stay of the superior court decisions. On September 18, 1975, the California Supreme Court issued the requested stay, reinstating the access rule to full force and effect. Thereafter, the ALRB General Counsel has vigorously enforced the rule against employers who denied access, through superior court injunction actions (Cal. Labor Code § 1160.4) and unfair labor practice proceedings. Cal. Labor Code § 1160.2.

On March 4, 1976, after six months' deliberation and following extensive briefing, oral argument, and a review of the entire evidentiary record, the California Supreme Court upheld the rule against all of appellants' challenges under the United States Constitution and on various state law grounds, and issued a peremptory writ of mandate directing the lower courts to set aside their previous orders. *ALRB v. Superior Court,* 16 Cal.3d 392 (1976). On April 1,

nated a temporary restraining order entered September 3, 1975 by Judge M. D. Crocker, thereby vacating all the findings and the conclusion of unconstitutionality contained in the order. *Pandol & Sons* v. *Edmund G. Brown, Jr.*, No. F-75-165-CIV (E.D. Cal.)

On September 10, 1975, Pandol & Sons and Jasmine Vineyards applied to this Court for a stay of the three-judge abstention order and for continuance of the temporary restraining order. That application was denied on September 28, 1975 by Mr. Justice Douglas, acting as Circuit Justice for the Ninth Circuit. *Pandol & Sons v. Edmund G. Brown, Jr.*, No. A-222. On September 26, 1975, Pandol & Sons and Jasmine Vineyards filed a notice of appeal to this Court from the abstention order but have since abandoned that appeal.



1976 the California high court denied appellants' request for a stay of its judgment.

On April 5, 1976, without requesting opposition from the Board, Mr. Justice Rehnquist, acting as Circuit Justice for the Ninth Circuit, denied stay applications presented by both sets of appellants.[4]

## NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BECAUSE THE ACCESS RULE IS CONSTITUTIONAL.

### A. The Access Rule Is a Valid Regulation of Property Under the Police Power.

As the California Supreme Court recognized, the access rule is part of a long tradition of state regulation of private property and business enterprise for the public welfare under the police power. *ALRB v. Superior Court,* 16 Cal.3d at 402–411. Such police power regulation has been repeatedly upheld by this Court against claims of unconstitutionality, even where the challenged provision sharply restricted the use or value of a landowner's property or interfered with an employer's freedom to contract with his employees. The only constitutional limitation is that a law must not be "unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia v. New York,* 291 U.S. 502, 525 (1934). The access rule is well within that constitutional boundary.

In the realm of the regulation of real property, the Court has upheld the constitutionality of zoning

[4] *Kubo v. ALRB,* No. A-868; *Pandol & Sons v. ALRB,* No. A-871.

and other land control provisions which were far more intrusive than the regulation challenged herein. In *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926), this Court sustained the validity of a zoning ordinance which, by prohibiting the plaintiff from using its property for industrial purposes, reduced the land's value from $10,000 to $2,500 per acre. In *Berman v. Parker,* 348 U.S. 26 (1954), an area-wide redevelopment project was held constitutional even though it resulted in the razing of buildings which were not slums and utilized private developers, rather than a governmental agency, in carrying out the plan. Rent control legislation, which may reduce the value of land by restricting maximum rents, has also been sustained. *Bowles v. Willingham,* 321 U.S. 503 (1944); *Block v. Hirsh,* 256 U.S. 135, 155 (1921). Most recently, in *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974), this Court upheld a local ordinance which limited a property owner's right to use his property to house more than two unrelated persons.

*Village of Belle Terre* should also lay to rest appellants' claim that the "reasonable relationship" test is inapplicable because an employer's property rights are allegedly "fundamental personal liberties," requiring more intensive judicial scrutiny. In *Village of Belle Terre,* the Court made clear that property rights are not fundamental:

> "[The ordinance] involves no 'fundamental' right guaranteed by the Constitution, such as voting, the right of association, the right of access to the courts, or any rights of privacy. We deal with economic and social legislation where legislatures have historically drawn lines which we respect . . . if the law be ' "reasonable not arbitrary" ' . . . and bears 'a rational relationship to a [permissible] state objective.' " (Citations omitted.)



If a homeowner's right to use his dwelling as he wishes is not fundamental, surely an employer's property interests occupy no higher status.

The fact that the access rule was promulgated as part of a comprehensive state labor relations statute further strengthens its constitutionality. This Court has often emphasized a state's broad police power authority to regulate employment and labor matters to protect workers. A few months ago, in *DeCanas v. Bica,* 96 S.Ct. 933 (1976), the Court unanimously upheld a California statute which prohibited employers from knowingly hiring illegal aliens, characterizing the provision as "within the mainstream of such police power regulation." 96 S.Ct. at 937. *See also West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937) (minimum wage law); *Bunting v. Oregon,* 243 U.S. 426 (1917) (maximum hours law); *New York Central R.R. v. White,* 243 U.S. 188 (1917) (workmen's compensation law). *See Generally, NLRB v. Stowe Spinning Co.,* 336 U.S. 226, 232 (1949).

The ALRA is intended to benefit all the people of California by promoting the peaceful resolution of farm labor disputes. ALRA Preamble, Stats. 1975,

Third Ex. Sess., Chap. 1, § 1. The access rule was adopted by the Board as necessary to implement the organizational rights which lie at the crux of the Act, and serves a similarly public function.[5] The regulation is not as intrusive as the provisions upheld in the cases cited. The right of entry which it grants is available only a few hours a day, only during an organizational campaign, and only to a limited number of organizers. See Part C2, *infra*. It does not affect the use or value of appellants' property, nor interfere with relations with their employees.

As the California Supreme Court correctly held, the access regulation is merely "a limited economic regulation of the use of real property imposed for the public welfare." ***ALRB v. Superior Court,*** 16 Cal.3d at 409. Since it is not "unreasonable, arbitrary or capricious," (***Nebbia v. New York, supra,*** 291 U.S. at 525), the rule does not violate due process.

[5] Appellant Pandol's claim that the rule improperly benefits private individuals—farm labor organizers—rather than the public is frivolous. As this Court recognized in *Babcock & Wilcox*, the intended beneficiaries of access by union organizers are the employees, who are provided with information necessary to cast an informed ballot. Such communication clearly fulfills a significant public purpose. *NLRB v. Babcock & Wilcox, supra,* 351 U.S. at 112–113. *See also Berman v. Parker, supra,* 348 U.S. at 33–34.

*Camara* v. *Municipal Court,* 387 U.S. 523 (1967) and *See v. City of Seattle,* 387 U.S. 541 (1967), also alleged to demonstrate the invalidity of the access rule, are inapposite. Those cases held that under the Fourth Amendment, warrants are required for searches of the interior of residential and commercial buildings. However, the Fourth Amendment does not apply to open fields. *Hester v. United States,* 265 U.S. 57, 59 (1924), reaffirmed in *Air Pollution Variance Bd. v. Western Alfalfa,* 416 U.S. 861 (1974).



### B. The Access Rule Is Constitutional Even Though It May Permit Access on the Property of Some Employers Whose Workers May Be Reached by Traditional Means of Communication.

The fact that there may be a small number of ranches at which access is not necessary to communicate with employees[6] does not mean that the Board's

[6] The ALRB and the California Supreme Court recognized that at a small percentage of California ranches, employees might be accessible by traditional means of communication. 8 Cal. Admin. Code § 20900, subd. 3; *ALRB v. Superior Court,* 16 Cal.3d at 410. Appellants' claims that alternate methods of communication are generally available or exist at their particular farms are either unsupported or flatly contradicted by the findings of the Board, the California Supreme Court, and the lower state courts.

In the *Pandol* action, the Tulare Superior Court made no finding whatsoever on this issue. In *Kubo,* the Fresno Superior Court specifically *deleted* proposed finding of fact number VII, which stated:

> "The evidence presented at the hearing establishes that labor organizations seeking to organize and represent Plaintiffs/Petitioners' agricultural employees have available numerous reasonable and effective, alternative means of contacting and communicating with Plaintiffs/Petitioners' agricultural employees outside Plaintiffs/Petitioners' private fields and orchards. There is no evidence in the record to show that labor organizations have attempted to use and been unable to use such alternative means of communication with Plaintiffs/Petitioners' agricultural employees."

(Note absence of paragraph VII from the Fresno County order, Appendix D of Kubo Jurisdictional Statement.)

In the federal *Pandol* matter, which is not part of this appeal, Judge Crocker's "finding" that other means of communication were available at the two plaintiffs' ranches was contained in an order prepared by counsel, and signed after a brief oral argument in chambers. The ALRB had no opportunity to submit evidence or briefs before the order was issued. No hearing on a preliminary injunction was ever held because the full three-judge panel ruled that it would "abstain from adjudicating all issues in this case" until after action by the state courts. Appendix F, Pandol Jurisdictional Statement. In conformance with its decision to abstain, the court terminated the restraining order, thereby vacating the findings and conclusions contained in the order. See fn. 3, *supra.*

decision to proceed by regulation, rather than by ranch-by-ranch adjudication, is unconstitutional. This Court has recognized that the choice between a general rule and ad hoc adjudication "lies primarily in the informed discretion of the administrative agency." *SEC v. Chenery,* 332 U.S. 194, 203 (1947). In making that decision, the agency may consider the cost, delay, and uncertainty inherent in individualized determinations. *Weinberger v. Salfi,* 422 U.S. 749, 777, 784–785 (1975). *See generally Mathews v. Eldridge,* 96 S.Ct. 893, 909 (1976). An exact fit between a rule's coverage and its purpose is not constitutionally required. *Mathews v. Diaz,* 44 U.S.L.W. 4748, 4753 (U.S. June 1, 1976).

In *Weinberger v. Salfi,* the Court upheld certain duration-of-relationship Social Security eligibility requirements, established to prevent fraud, although the provisions disqualified some beneficiaries who were guilty of no sham. The Court noted:

> "While such a limitation doubtless proves in particular cases to be 'under-inclusive' or 'over-inclusive,' in light of its presumed purpose, it is nonetheless a widely accepted response to legitimate interests in administrative economy and certainty of coverage for those who meet its terms. . . . [The Government] may rely on such rules so long as they comport with the standards of legislative reasonableness enunciated in cases like *Dandridge v. Williams* and *Richardson v. Belcher.*
>
> "Under those standards, the question raised is not whether a statutory provision precisely filters



> out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylactic provisions. . . . Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than nonmembers. The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule." 422 U.S. at 776–777.

These principles were applied to administrative rulemaking in *Mourning v. Family Publication Service, Inc.,* 411 U.S. 356 (1973). There the Court sustained a regulation, promulgated under the Truth-in-Lending Act, requiring disclosure of certain contract information in credit transactions involving more than four installments. Although the purpose of the regulation was to promote disclosure of finance charges, the rule applied in some cases where there was no such charge. Emphasizing the deference owed to administrative expertise in fashioning remedies and the broad rulemaking authority vested in administrative agencies, the Court sustained the regulation, declaring:

> "[A] requirement that a line be drawn which insures that not one blameless individual will be

> subject to the provisions of an act would unreasonably encumber effective administration and permit many clear violators to escape regulation entirely. . . . [T]his rationale applies to administrative agencies as well as to legislatures. . . ." 411 U.S. at 374.

*See also California v. LaRue,* 409 U.S. 109 (1972), where a California regulation restricting sexual entertainment in bars and nightclubs was sustained against a First Amendment claim of overbreadth. The Court stressed an agency's "wide latitude as to choice of means to accomplish a permissible end," and commented, "The Department's choice of a prophylactic solution instead of one that would have required its own personnel to judge individual instances of inebriation cannot . . . be deemed an unreasonable one. . . ." 409 U.S. at 116.[7]

Significantly, in both *Salfi* and *Mourning*, the Court rejected contentions that the challenged provisions were invalid as irrebuttable presumptions. *Weinberger v. Salfi, supra,* 422 U.S. at 767–774; *Mourning v. Family Publication Service, Inc., supra,* 411 U.S. at

[7] The Court has frequently applied these principles to economic regulations restricting real property rights. *See Village of Euclid* v. *Ambler Realty Co., supra,* 272 U.S. 365, 388 ("inclusion of a reasonable margin to insure effective enforcement" of a zoning ordinance upheld despite claim that plaintiff's land was unreasonably affected); *Village of Belle Terre* v. *Boraas, supra,* 416 U.S. 1, 8 (ordinance permitting two, but not more, unrelated persons to occupy a house sustained since "every line drawn by a legislature leaves some out that might well have been included"); *Berman* v. *Parker, supra,* 348 U.S. 26 (redevelopment on an area, rather than structure-by-structure, basis approved although some non-slum buildings might be demolished).



377. A similar argument by appellant Pandol must also fail. The access rule does not presume that alternative methods of communication with agricultural employees are lacking at all ranches. It functions as a prophylactic measure, requiring access at all employers' premises because of the Board's finding that it will be needed at most. *See Mourning, id.*

The factors outlined in the above cases were precisely the ones considered by the ALRB in determining to proceed by regulation, rather than by individualized determination. The Board realized that a case-by-case approach to access would be enormously expensive[8] and time-consuming, requiring the Board to expend a large proportion of its limited budget in a vast number of individualized proceedings, most of which would result in an order requiring access. In the meantime, the Board concluded, employees' organizational and electoral rights would be lost as the fleeting harvest season passed, and conflict and blood-

[8] While the Board members did not know the precise cost of a case-by-case approach when they adopted the rule, they were aware that it was well beyond the bounds of the ALRB budget. Subsequently, detailed calculations were prepared. *See ALRB, Report on S.B. 1441 before the Calif. Senate Finance Comm., Financial Impact of Determination of Access on a Case-by-Case Basis* (March 29, 1976), Appendix A-1. That report estimates that it would cost $2.5 million to comply with a proposed amendment to the Act requiring individualized access hearings. The bill did not pass. An earlier declaration by the ALRB Chief of Administration, submitted to the California Supreme Court, calculated the cost at $1 million if the individual access hearings lasted only one day. Appendix A-2. The $2.5 million figure, based on access hearings lasting an average of two days, represents a more realistic estimate. The Court is requested to take judicial notice of these reports. *Carolene Products* v. *United States,* 323 U.S. 18, 28 (1944).

shed would continue in the fields. In this unique and limited factual setting, the Board's choice of a prophylactic rule over ranch-by-ranch adjudication was entirely reasonable.

### C. The Access Rule Is Consistent with the Principles of Babcock & Wilcox, Central Hardware, and Hudgens.

#### 1. The Regulation Reflects a Proper Balance Between Organizational and Property Rights.

The access rule does not conflict with this Court's decisions in *NLRB v. Babcock & Wilcox Co., supra,* 351 U.S. 105; *Central Hardware Co. v. NLRB, supra,* 407 U.S. 539; and *Hudgens v. NLRB, supra,* 96 S. Ct. 1029 (1976). Those cases held that under the National Labor Relations Act, union organizers must be given access to an employer's premises for organizational purposes when employees cannot be reached through alternative means of communication.

As a threshold matter, the cases are irrelevant to any determination of the validity of the ALRB regulation for one simple reason: the decisions do not set forth constitutional principles, but simply interpret sections 7 and 8(a)(1) of the NLRA. 29 U.S.C. §§ 157, 158(a)(1). Strikingly absent from the opinions is any reference to the Constitution or the Due Process Clause as the source of limitations on the right of access. Rather, the Court in *Hudgens* characterized the balancing test of *Babcock & Wilcox* as establishing a "statutory standard" (96 S. Ct. 1033) involving "statutory criteria," (*id.* at 1032), and concluded that "the rights and liabilities of the parties in this case are dependent exclusively upon



the National Labor Relations Act." *Id.* at 1037. The Court remanded the case to the NLRB to be "considered under the statutory criteria of the National Labor Relations Act alone." *Id.* at 1038. Clearly, such a federal statutory interpretation does not bind a California administrative agency in implementing its own state statute.

Assuming, *arguendo,* that *Babcock & Wilcox* and its progeny state a *constitutional* doctrine, the ALRB rule complies with their holdings. Those decisions do not require that access be determined on a case-by-case basis. The issue was not even presented in *Babcock & Wilcox* and *Central Hardware,* and the opinions are accordingly silent on the matter. *ALRB v. Superior Court,* 16 Cal.3d at 414. However, in *Hudgens,* decided the day before the California Supreme Court ruling in this case, this Court strongly implied that in appropriate circumstances, a labor board might formulate a rule of access applicable to a whole class of employers. "In *each generic situation,*" the Court wrote, "the primary responsibility for making this [access] accommodation rests with the Board in the first instance." 96 S. Ct. at 1038. (Emphasis added.)

Appellants' claim that each employer must be treated separately ignores this portion of *Hudgens,* and would place these three federal labor cases at sharp odds with the general principles, discussed *supra* Part B, that an administrative agency may use its informed discretion to choose between a general

rule and ad hoc adjudication, and that a police power regulation is not unconstitutional simply because it may apply in some cases where it is not strictly necessary.

In the final analysis, the sole command of *Babcock & Wilcox* and its offspring—assuming that the cases state a constitutional requirement—is that the process of determining access must involve an accommodation between organizational and property rights "with as little destruction of one as is consistent with the maintenance of the other." 351 U.S. at 112. The decisions do not dictate a particular procedure for achieving that balance and make clear that the major responsibility for reaching the accommodation and adjusting it to the realities of the work place, lies with the labor relations agency, not the courts. *Hudgens v. NLRB, supra,* 96 S. Ct. at 1038; *NLRB v. Babcock & Wilcox, supra,* 351 U.S. at 112.

The ALRB fully complied with the mandate of accommodation when it promulgated the access rule. The Board considered the extensive evidence that California farmworkers are mobile, illiterate and speak foreign languages, rendering them largely inaccessible to off-the-job contact, and took into account the ALRA's seven-day election and peak-season provisions, which make swift communication between organizers and workers essential. Additionally, the Board was aware that the slow process of adjudicating thou-



sands of individual unfair labor practice charges involving access, when coupled with the Act's peak-season election provisions, would deprive most California agricultural employees of an opportunity to vote in a union election for several years. Finally and crucially, the ALRB knew that with its limited budget, it simply could not afford to conduct large numbers of individualized hearings. To have opted for case-by-case adjudication of access would have meant, not the balancing of conflicting positions, but rather the wholesale destruction of the organizational rights of the state's farmworkers.[9]

Thus, the Board concluded that accommodation, in the context of California agriculture and the ALRA, demanded the adoption of a limited and specific access rule. What the outcome might be in a different state, a different industry, or under a different statute is wholly speculative and is irrelevant to this appeal. The sole question confronting the Court is whether on *these* facts and under *this* statute, the ALRB's determination was reasonable. *See California v. LaRue,*

[9] The fact that the *ALRB* balanced the conflicting interests makes irrelevant appellants' argument that the *California Supreme Court* erred when it applied a "rational relationship," rather than a balancing, test in its constitutional analysis. Additionally, the California high court *did* measure the regulation against the *Babcock & Wilcox* criteria. It simply did so during its discussion of whether the rule was consistent with NLRB precedents, as required by section 1148 of the Act. Cal. Labor Code § 1148. *ALRB* v. *Superior Court,* 16 Cal.3d at 412–416. The Court's reasoning and conclusion are fully applicable here.

*supra,* 409 U.S. at 116. For all the reasons stated, the answer must be yes.[10]

[10] The existence of labor relations statutes in other states is no basis to note probable jurisdiction in this case. None of the four states with special farm labor laws—Arizona, Kansas, Idaho, and Oregon—has promulgated an access rule and none is likely to do so for several reasons.

First, the statutory schemes of the Arizona, Kansas, and Idaho statutes are significantly different from the ALRA. None of the three sets any time limit on how quickly an election must be held; none provides that the election be conducted during peak season; all require a time-consuming pre-election unit hearing. Ariz. Rev. Stats. § 23-1381, et seq.; Kansas Stats. Ann. § 44-818, et seq.; Idaho Code § 22-4101, et seq. Thus, the ALRA's strict time constraints, an important factor in the promulgation of the access rule, are missing in these other states.

Additionally, the Idaho and Kansas statutes are simply not in use. We are informed by the Idaho Attorney General's Office that no election has ever been held under its statute. According to the Kansas Attorney General's Office, the Kansas Agricultural Labor Relations Board conducted one election, which was never certified, and the Board has not met since 1974. The General Counsel of the Arizona Agricultural Employment Relations Board has informed us that there have been only five elections under the Arizona statute since its passage in 1972.

The Oregon farm labor statute establishes no labor relations board and makes no provision for holding elections. It simply limits harvest-time picketing. Ore. Rev. Stats. § 662.805 et seq. Contrary to the claim of appellant Kubo, Michigan has no farm labor statute whatsoever. In fact, both Michigan and Oregon have comprehensive labor relations statutes which specifically exclude agricultural employees. Mich. Stats. Ann. § 17.454(2)(e); Ore. Rev. Stats. § 663.005(3)(a). The farm labor bills introduced in the legislatures of Texas, New Mexico, Utah, Hawaii, Washington, and Florida have all died.

The labor relations statutes of Hawaii, New Jersey, Wisconsin and Puerto Rico do not exclude agricultural workers, but contain no expedited procedure geared to agricultural elections. Haw. Rev. Stats. § 377-1 et seq.; Rev. Stats. of N.J. § 34:13A-1 et seq.; Wisc. Stats. Ann. § 111.01, et seq.; Laws of Puerto Rico, Title 29, § 62, et seq. Consequently, the time pressures requiring an access rule are absent.

The general organizing statutes in other states are simply broad declarations of the rights of employees to organize, but establish no labor relations agency or electoral machinery. Ark. Stats. Ann. § 41-4124; Colo. Rev. Stats. § 8-2-101, et seq.; Ind. Ann. Stats. § 35-15-3-1; La. Rev. Stats. § 23.822; Mo. Const. Art. I, § 29; Nev. Rev. Stats. § 614.090, et seq.; N.Y. Const. Art. I, § 17; N.D. Rev. Code § 34-19-01; Pa. Stats. Ann., Title 43, § 191; Tex. Stats. Ann. Art. 5207a; Utah Code Ann., § 34-2-1; Rev. Code of Wash. § 49.36.010, et seq. Indeed, several of these states also have comprehensive labor relations statutes which exclude farmworkers from their coverage. Colo. Rev. Stats. § 80-4-2(3)(a); N.Y. Labor Law § 701(3); N.D. Rev. Code § 34-12-01(3); Pa. Stats. Ann., Title 43, § 211.3(d); Utah Code Ann. § 34-20-2(3).



**2. The Extent of Access Permitted by the Rule Comports With the Guidelines Set Forth in Central Hardware.**

The scope and duration of access granted by the ALRB regulation are consistent with the general guidelines set forth in *Central Hardware.* There, continuing its balancing theme, the Court declared:

> "(T)he allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' § 7 rights. After the requisite need for access to the employer's property has been shown, the access is limited to (i) union organizers; (ii) prescribed nonworking areas of the employer's premises; and (iii) the duration of organizational activity." 407 U.S. at 545.

The ALRB access rule, which permits non-disruptive entry by two organizers per work crew for 60 minutes before and after work and 60 minutes during employees' lunch period, complies with the spirit of *Central Hardware,* as applied to the California agricultural setting. *ALRB v. Superior Court,* 16 Cal.3d at 417.

First, access is clearly limited to union organizers. The rule expressly so provides and even prescribes

the number of organizers permitted to enter. The regulation further requires organizers to wear a badge or other designation of affiliation and, upon request, to identify themselves by name and labor organization to the employer or his agent. Both the numbers restriction and the identification requirement are more stringent than the standards of *Central Hardware*.

The second *Central Hardware* guideline—that access be limited to nonworking areas—cannot be literally met because, as the Board and the State Supreme Court found, California ranches generally have no nonworking areas, such as the parking lots and lunchrooms available in industrial settings. *ALRB v. Superior Court*, 16 Cal.3d at 417. However, the purpose of this provision—to prevent disruption of production (*id.*)—is satisfied in the only way possible in the agricultural context, by limiting access to nonworking periods, and restricting organizers to the locations at which the employees congregate or eat lunch.[11] Further the rule expressly prohibits any disruption of "the employer's property or agricultural operations, including injury to crops or machinery" 8 Cal. Admin. Code § 20900, subd. 5(e), and permits expulsion of any organizers who engage in disruptive conduct.

[11] If there is no established lunch break, the ALRB regulation permits a one-hour access period "at any time during the working day," 8 Cal. Admin. Code § 20900, subd. 5(b), to cover piece-rate workers, who lack a fixed lunch period and are permitted to select their own breaks. The rule thus allows piece-rate workers to utilize their non-working periods to talk to organizers who have entered the premises.



Finally, access is limited in duration because it ceases after election results have been certified. 8 Cal. Admin. Code § 20900, subd. 5(f). The Act requires the Board to promptly certify an election unless objections are filed within five days. Cal. Labor Code § 1156.3(d).

## CONCLUSION

California is engaged in a novel experiment. Agricultural workers have historically been excluded from coverage under the National Labor Relations Act because Congress recognized that their employment situation was so different from that of industrial workers that it would be awkward, if not impossible, to treat them under a single statutory scheme. California is the nation's largest agricultural producer, and agriculture is California's largest industry. So it is altogether fitting that California would make the first comprehensive attempt to define the rights and obligations of agricultural employers and employees by means of a state farm labor statute with a full-time regulatory agency. Faced with a unique factual situation, the California Legislature and the California Agricultural Labor Relations Board have developed a unique legal response—an access rule that effectuates farmworkers' newly created organizational rights in a manner tailored to the particulars of California agriculture.

Federalism requires that California be free to experiment with new solutions to sensitive social and economic problems without unnecessary interference by the federal judiciary. *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 164–167 (1973), and cases cited therein. The benefits that can flow from a federal system which provides room for social experimentation by the states were perhaps best extolled by Mr. Justice Brandeis, dissenting in *New State Ice Co.* v. *Liebmann,* 285 U.S. 262, 311 (1932), at the close of the heyday of the now discredited substantive due process doctrine:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

California has long been searching for a just solution to the conflict that has plagued its fields and orchards. The ALRA and the access rule which implements it are the fruits of that search. The Court should decline to note probable jurisdiction of these appeals both because the access regulation is constitutional, as has been demonstrated, and because the



rule is so specifically directed to a local problem that a decision would be too narrow to have national application.

Dated: June 25, 1976

Respectfully submitted,

ELLEN LAKE, Counsel

BYRON S. GEORGIOU, Counsel

JERROLD C. SCHAEFER,
Deputy General Counsel

ROBERT LE PROHN, Chief of
Litigation

Attorneys for Appellee
AGRICULTURAL LABOR
RELATIONS BOARD

(Appendices Follow)

# APPENDIX A-1

March 29, 1976

## REPORT OF THE AGRICULTURAL LABOR RELATIONS BOARD ON SENATE BILL 1441 BEFORE THE CALIFORNIA SENATE FINANCE COMMITTEE—FINANCIAL IMPACT OF DETERMINATION OF ACCESS ON A CASE-BY-CASE BASIS

Section 14 of Senate Bill 1441 would amend Labor Code Section 1153(a) to provide that: "[I]n accordance with and subject to National Labor Relations Act precedent, it shall not be an unfair labor practice, nor grounds for objecting to conduct affecting the results of an election, for an agricultural employer to deny nonemployee labor organization organizers or representatives the right of access to its premises. In such cases, the burden of proof to establish there are no reasonable alternative means of communicating with employees shall be on the party seeking to gain access." The effect of this provision, should it become law, would be to require the Agricultural Labor Relations Board to determine access on a case-by-case basis rather than by the present regulation, which grants a limited right of access at the premises of all agricultural employers. In order to provide the Senate Finance Committee with full information regarding the financial impact of this proposed amendment, the Agricultural Labor Relations Board and its General Counsel, with the aid of the Board's Chief of Administration, have prepared the following analysis of the operational costs of such a case-by-case determination of access.

(1) The proposed amendment would require the Board to adopt the NLRA procedure for determining

access. The NLRB decides whether union organizers have a right of access to a particular employer's property in the context of an unfair labor practice proceeding which is initiated by the filing of a charge by a union that contends it has wrongfully been denied access. The basic inquiry in such unfair labor practice proceedings under the NLRA is whether union organizers have reasonable alternative means to communicate with the employer's workers. This is essentially a factual question which requires detailed investigation into such issues as: the stability of the work force, including the percentage of workers who live in the community throughout the year, the percentage of workers who work year-around for this employer, how long workers who work less than the full year are employed, whether workers are provided through a labor contractor, the percentage of employees who live on and off the employer's property, the location of the homes of those who live off the property, the means by which those employees reach work, the physical layout of the employer's property (e.g., whether employees park their cars within or outside of the employer's property), whether employees spend their entire day on the employer's property or whether they are outside the borders of the property during breaks, whether they customarily congregate at a place outside the borders of the property prior to commencing or after completing work, and numerous other questions. These issues would also be the crux of a case-by-case determination of access under the ALRA.

(2) The financial analysis set forth herein is based on the costs which the ALRB has found to be entailed in the investigation and trial of other unfair labor



practice cases under the ALRA. Although the General Counsel has prosecuted some cases involving denial of access under the present regulation, these cases have been far simpler factually and legally than the NLRA approach because the question of alternative means of communication is not presented in those cases. Additionally, as will be set forth, the number of incidents of denial of access under the present regulation has been far fewer than is anticipated under the case-by-case approach. For all these reasons, the costs of determining denial of access cases will be greatly multiplied.

(3) Denial of access generally occurs in relation to attempts by one or more unions to obtain authorization cards necessary to file an election petition and in attempts to campaign once an election has been scheduled. Based upon the Board's experience during the period of August 1975 to January 1976, we anticipate that approximately 1250 election petitions will be filed during the 1976–1977 fiscal year. Based also on experience to date, the General Counsel estimates that absent the present general regulation requiring access at all ranches, unfair labor practice charges alleging a wrongful denial of access to union organizers will be filed in approximately 75% of those cases in which a union seeks to organize the employees of an agricultural employer and petitions for an election. Since we expect 1250 elections petitions during the fiscal year beginning July of 1976, the General Counsel anticipates that unfair labor practice charges alleging a wrongful denial of access will be filed in approximately 938 cases. While such wrongful denial of access allegations may lessen in future years, the history

of the relationship between California growers and farm labor unions over the last decade and the opposition which the Board's current access rule has evoked among employers suggest that a 75 percent incidence of wrongful denial of access is likely during the next year.

(4) When a union files an unfair labor practice charge alleging wrongful denial of access, significant costs are generated by three processes: (1) investigation of the charge by an investigator from the General Counsel's office, (2) the obtaining of a Superior Court injunction if the General Counsel finds the charge meritorious and issues a complaint, and (3) the trial of the case before an Administrative Law Officer by an attorney from the General Counsel's office. The costs of each of these three processes are analyzed separately.

The General Counsel estimates that investigation of unfair labor practice charges involving access would take between one and four days per case, including a personal visit to the employer's property by the investigator. Assuming that the average time for investigation of each case is two days, we estimate that investigation costs per case, including the investigator's salary, travel and per diem costs, would be $200.

(5) Section 1160.4 of the Labor Code gives the General Counsel power to seek injunctive relief against the continued commission of unfair labor practices. It has been the General Counsel's practice to seek injunctive relief in nearly all cases of denial of access under the present regulation where such denial will interfere with a labor organization's ability to organize employees or effectively campaign



prior to an election. Since the General Counsel anticipates a great increase in the incidents of wrongful denial of access if the Board were forced to use a case-by-case approach, the number of instances in which General Counsel would seek injunctive relief would correspondingly increase. At minimum, each suit would involve costs of an attorney's salary for one day of preparation and one day of hearing, necessary travel and per diem costs, and secretarial support in preparing the necessary legal papers. The estimated cost of each injunction suit is at least $300.

(6) The trial of an unfair labor practice case must, by statute, be a formal hearing with a transcribed record. Consequentl each unfair labor practice hearing on access would require the Board to pay for the services of an Administrative Hearing Officer, rental of a hearing room, costs of a court reporter and preparation of a transcript, travel expenses and per diem allowance for the hearing officer, costs of an interpreter, and salary for one attorney for pre-trial preparation and trial of the case. Because of the detailed evidence which would be involved in access cases, each such access hearing would probably be of substantial length, perhaps 1–2 days in the simpler cases and five or more days in the complex cases. In addition, the initial trials on access, which would establish legal precedent which may make settlement of later cases possible, would no doubt be exhaustively tried by all parties and therefore might last up to 10 days per case.

Our experience has been that each day of unfair labor practice hearing costs the Board at least $1050, broken down as follows:

| | |
|---|---|
| Salary of Hearing Officer | $ 150 |
| Salary of General Counsel staff attorney to try case | 100 |
| Cost of court reporter and transcript | 550 |
| Salary of Interpreter | 50 |
| Daily travel expense and per diem allowance for hearing officer | 50 |
| Daily travel expenses, per diem allowance, and other overhead for staff attorney, and other staff | 50 |
| Salary of hearing officer for post-hearing report-writing—4 hours for each day of hearing | 75 |
| Rental of hearing room | 25 |
| Total | $1050 |

To those costs must be added certain pre-hearing and other one-time costs, as follows:

| | |
|---|---|
| Four hours' pre-hearing salary for hearing officer, including travel time and preparation | 75 |
| Salary of General Counsel staff attorney for two days pre-hearing preparation, plus associated per diem, travel, and other overhead costs | 250 |
| Administrative overhead costs, including supervising the hearing officer and salary of calendar clerk | 25 |
| Total | $ 350 |

Even if we take a conservative estimate that during the 1976–1977 fiscal year, the average hearing time for access cases would be only two days, we calculate that the total hearing costs of each access case hearing



would be $2450.

(7) Thus the cost of investigation and hearing in each access case would be approximately $2650. If injunctive relief was sought in most cases, as expected, that would add an additional $300 per case. The 938 access cases anticipated in fiscal year 1976–1977 would add increased expenses of $2,485,700 to the Board's operational costs. Needless to say, these costs are not now included in the Board's proposed $6.7 million budget.

# APPENDIX A-2

## SUPREME COURT OF THE STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD, ET AL,
*Petitioners,*
v.
SUPERIOR COURT OF FRESNO COUNTY, SUPERIOR COURT OF TULARE COUNTY,
*Respondents,*
and
PANDOL AND SONS, ET AL.
*Real Parties in Interest.*

No. SF 23349
DECLARATION OF C. DAVID WILLIS

I, C. DAVID WILLIS, declare:

I am the Chief of Administration for the Agricultural Labor Relations Board (ALRB). In that capacity, I oversee all administrative functions of the agency including payroll, accounting, business services, management analysis, and budgeting. I have ultimate responsibility under the Board and the General Counsel for all financial aspects of the agency. I have held this position since November 3, 1975. Prior to that period, I served as Budget Officer for the State Department of Water Resources from 1971–1975, and was a Budget Analyst between 1965 and 1971 for the Department of Water Resources and the State Department of Education. In each of these prior jobs, I performed similar functions in relation to the financial functioning of the respective agencies.

Since I became Chief of Administration for the ALRB, I have reviewed and approved the payment of all expenditures relating to unfair labor practice hearings. Consequently, I am intimately familiar with all

aspects of the costs of such hearings. Based on that experience, I have found that on the average a one-day hearing on an unfair labor practice charge costs the Board at least $1,300. That cost is broken down as follows:

| | |
|---|---|
| *Pre-Hearing and Other One-Time Costs:* | |
| Four hours' pre-hearing salary for hearing officer, including travel time and preparation | $ 75 |
| Salary of General Counsel staff attorney for one day's pre-hearing preparation | 100 |
| Salary of ALRB investigator for one day's investigation | 50 |
| Administrative overhead costs, including supervising the hearing officer and salary of calendar clerk | 25 |
| *Sub-total* | $ 250 |
| *Daily Costs:* | |
| Salary of Hearing Officer | 150 |
| Salary of General Counsel staff attorney to try case | 100 |
| Cost of court reporter and transcript | 550 |
| Salary of Interpreter | 50 |
| Daily travel expense and per diem allowance for hearing officer | 50 |
| Daily travel expenses, per diem allowance, and other overhead for staff attorney, and other staff | 50 |
| Salary of hearing officer for post-hearing report-writing—four hours for each day of hearing | 75 |
| Rental of hearing room | 25 |
| *Sub-total* | $1050 |
| TOTAL | $1300 |



As indicated above under "Daily Costs," each additional day of hearing beyond the first day costs an additional $1050.

If the Board is required to determine access on a case-by-case approach, following the filing of an unfair labor practice charge by a union that had been denied access, each such hearing would thus cost a minimum of $1300, plus $1050 for each additional day of hearing after the first day.

Based on the ALRB's experience thus far, we have estimated that the Board will conduct 1250 elections during the 1976–77 budget year. (The Board conducted 409 elections during its first five months of operations.) In the absence of an access rule, the General Counsel estimates that denial of access is likely to be an issue in at least 75 percent—or 938—of these elections, requiring the holding of an unfair labor practice hearing in each such case. Based on our previous experience, the holding of one-day hearings in these cases would cost the Board an additional $984,900 in the 1976–77 budget year. Longer hearings, at an increased cost, would be probable in a large percentage of these matters.

The Board's $6.7 million proposed budget for the 1976–77 budget year is based on the assumption that the access rule will be upheld, and does not reflect the increased expenses described herein.

I declare under penalty of perjury that the foregoing is true and correct. Executed under penalty of perjury on March 2, 1976 in Sacramento, California.

C. DAVID WILLIS

o